

A brief recitation of the history of this claim is necessary. On September 9, 2003, the Administrative Law Judge (ALJ) entered an Award finding claimant suffered a 60 percent whole person functional impairment. On February 11, 2004, the Board modified the ALJ's Award to find claimant suffered a permanent total disability. The Board further awarded claimant ongoing psychological and psychiatric treatment. In an unpublished opinion filed January 14, 2005, the Court of Appeals affirmed the Board's Order.

On March 23, 2004, the claimant filed an application for post award medical requesting additional psychological treatment. But claimant neither requested a hearing on the application nor pursued such additional treatment.

On August 9, 2005, respondent filed an application for review and modification of the decision entered "on September 9, 2003, modified by Appeals Board Order on February 11, 2004, affirmed by Kansas Court of Appeals on January 14, 2005." It was further alleged the "award was obtained by fraud, serious misconduct, is excessive and the functional impairment or work disability of the claimant has diminished." Respondent never requested a hearing on its application but apparently scheduled medical examinations of claimant with Drs. Do and Woltersdorf pursuant to K.S.A. 44-515(a).

On September 21, 2005, claimant filed a motion to quash the medical examinations of claimant requested by respondent. In the alternative, on September 29, 2005, the claimant filed an application for post award medical seeking per diem, transportation costs as well as hotel accommodations for the scheduled appointments with Drs. Do and Woltersdorf. A hearing on the application was scheduled for November 10, 2005.

On November 10, 2005, a hearing was conducted by the ALJ on both claimant's motion to quash and application for post award medical. On February 27, 2006, the respondent requested the case be transferred to a special administrative law judge (SALJ) because the ALJ had failed to issue a decision after the November 10, 2005 hearing. As previously noted, the ALJ then issued her decision on March 2, 2006.

At the hearing on November 10, 2005, claimant withdrew her request for additional psychological treatment from her earlier application for post award medical and respondent agreed to pay for claimant's travel expenses to attend the proposed medical examinations. Thus, the only issue for determination was claimant's motion to quash the scheduled medical examinations. The ALJ then noted in her Order that all outstanding disability and medical compensation had been paid. The ALJ further noted the claim had been fully litigated, appeals exhausted with no remaining issues and claimant was not presently seeking psychiatric treatment. Consequently, the ALJ granted claimant's motion to quash.

The respondent requests review of the following: (1) whether the ALJ had authority to render a decision since respondent had requested the director to assign this case to a SALJ; (2) whether respondent is entitled to have claimant examined pursuant to K.S.A. 44-515a since a review and modification is pending; and, (3) whether the ALJ erred in denying respondent's request to have claimant examined. Respondent argues the payment of all permanent total disability benefits and outstanding medical expenses does not constitute an acquiescence in the Award which is subject to review at any time.

Claimant raises the following issues on review: (1) whether the Board has jurisdiction to hear this appeal; (2) whether the ALJ has authority to rule on claimant's motion after a request for reassignment; (3) whether respondent has the authority to

request for claimant to be examined; and, (4) whether review and modification is barred by the doctrine of *res judicata*? Claimant argues the Board does not have jurisdiction to hear this appeal pursuant to K.S.A. 44-555c and 44-551(b)(1). Claimant finally argues there is no evidence to support respondent's contention of a fraudulent claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Initially, respondent argues the ALJ did not have jurisdiction to enter a decision on claimant's motion to quash because respondent had requested that the case be reassigned to a SALJ when a timely decision was not entered after the hearing on November 10, 2005.

K.S.A. 44-534a provides a decision in a preliminary hearing shall be rendered within 5 days of the conclusion of such hearing. K.A.R. 51-3-5a provides that if a decision is not rendered within 5 days after a preliminary hearing the director of workers compensation is to be notified and the director shall demand a decision from the administrative law judge. K.S.A. 44-523(c) requires an administrative law judge to issue a decision on an award within 30 days after the case is submitted. If a decision is not timely entered any party may request the director to assign the case to an assistant director or special administrative law judge for a decision.

The November 10, 2005 hearing consolidated claimant's request for post award medical with her motion to quash the respondent's request that she appear for medical examinations. An application for post award medical is subject to the same hearing procedure as provided in K.S.A. 44-523.¹ A motion hearing is procedurally akin to a preliminary hearing. But in either case the respondent's request to the director for reassignment of the matter did not affect the assigned ALJ's jurisdiction to enter a decision. The filing of a request that a case be reassigned does not deprive the administrative law judge of jurisdiction to make an award.² Because a motion hearing is treated the same as a preliminary hearing the director simply demands a decision from the assigned ALJ upon being notified that the decision was not timely entered. Consequently, the Board finds the assigned ALJ retained jurisdiction to enter a decision after the November 10, 2005 hearing.

The Workers Compensation Act provides, in part:

¹ See K.S.A 44-510k(a).

² *Bradford v. Boeing Military Airplanes*, 22 Kan. App.2d 868, 924 P.2d 1263, rev. denied 262 Kan. 1082 (1996).

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation **subject to the limitation provided in the workers compensation act.**³ (Emphasis Added)

However, any modification under the review and modification statute is effective the date the claimant's functional impairment or work disability changed or no earlier than six months prior to the date the application for review and modification was made.⁴ Moreover, a modified award only compensates for the remaining unpaid weeks, if any, that are proven but not yet expired. Once the employer pays the maximum amount, the modified award does not offer further payment.⁵

The claimant was determined to have suffered permanent total disability as a result of her work-related accident. The maximum amount of compensation for a permanent total disability is limited to \$125,000.⁶ In this case, the earliest effective date for any modification of the award would have been approximately February 9, 2005, the date six months prior to respondent's filing the application for review and modification. That date is after the decision of the Court of Appeals and after the disability compensation had been all paid out.⁷ Consequently, it is impossible to retroactively modify claimant's award in this instance. Stated another way, any modification of the award was subject to the maximum payment limitation provided in K.S.A. 44-510f.

³ K.S.A. 44-528.

⁴ K.S.A. 44-528(d).

⁵ *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

⁶ K.S.A. 44-510f.

⁷ M.H. Trans. at 11.

At the motion hearing on November 10, 2005, respondent implied it retained the right to modify the original award because it was fraudulently obtained. Although the parties have the right to apply for review and modification of an earlier award pursuant to K.S.A. 44-528, such statute does not allow collateral attacks on previous awards. *Res judicata* bars relitigation of past facts such as occurrence of a compensable accident, liability, causation and degree of disability at the time of the initial award.⁸ In *Acosta*⁹ the Supreme Court determined neither the ALJ nor the Board has the authority to declare a prior award void *ab initio*. That appears to be part of the reason respondent filed its application for review and modification and neither the Board nor the ALJ can provide respondent the remedy it seeks.

Respondent next argues that because its application for review and modification was pending, it was appropriate to request claimant submit to medical examination. Respondent notes the Board ordered that claimant be provided with ongoing psychiatric treatment and it seeks medical evidence to determine claimant's entitlement to that benefit.

It is distressing that although psychiatric treatment was previously ordered, it apparently was not provided to claimant by respondent. But neither did claimant seek such treatment. And at the motion hearing on November 10, 2005, claimant withdrew her request for such treatment. Accordingly, at the time of the motion hearing psychiatric treatment was neither being provided nor requested by claimant.

Claimant argues that after she withdrew her request for treatment there was no present controversy to adjudicate regarding that course of treatment. That is not the case in this claim where respondent was specifically ordered to provide ongoing treatment. Although there is nothing in the record that indicates the claimant plans to seek psychological or psychiatric treatment the Board's Order specifically required that respondent provide such treatment. This is different than other ALJ and Board orders which require application and hearing before post-award medical treatment is authorized. Therefore, it is appropriate for respondent to seek evidence to address that prospective issue and either get the Board's Order modified to reflect that claimant's future psychiatric treatment be upon application and hearing or, if warranted by the evidence, terminated.

Stated another way, respondent's application for review and modification does address a portion of the Order that is prospective, i.e., the order to provide ongoing psychiatric treatment. And respondent can request claimant submit to medical examination

⁸ *Brandt v. Kansas Workers Compensation Fund*, 19 Kan. App. 2d 1098, 880 P.2d 796, *rev. denied* 256 Kan. 994 (1994).

⁹ *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 44 P.3d 330 (2002).

because of that pending ongoing issue regarding medical compensation.¹⁰ Consequently, the Board reverses the ALJ's Order and denies claimant's motion to quash.

AWARD

WHEREFORE, it is the decision of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 2, 2006, is modified to reflect that claimant's Motion to quash is denied.

IT IS SO ORDERED.

Dated this _____ day of May 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Jerry M. Ward, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹⁰ K.S.A. 44-515(a).